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U.S. Department of Justice

Immigration and Naturalization Service

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: WAC 01 241 56375

Office: CALIFORNIA SERVICE CENTER

Date:

JAN 30 2003

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a California organization incorporated in March of 1998. It is engaged in the business of automobile repair. It seeks to employ the beneficiary as its executive director. Accordingly, the petitioner seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the petitioner or the foreign entity had control over the automobile repair business that had been established as a franchise. The director also determined that the petitioner had not established that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity or had been employed in a managerial or executive capacity for the overseas entity.

On appeal, counsel for the petitioner asserts that the Service erroneously concluded that the beneficiary was not eligible for this classification.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers.
-- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

Title 8, Code of Federal Regulations, section 204.5(j)(3) states:

(i) Required evidence. A petition for a multinational executive or manager must be accompanied by a statement from an authorized official of the petitioning United States employer which demonstrates that:

(A) If the alien is outside the United States, in the three years immediately preceding the filing of the petition the alien has been employed outside the United States for at least one year in a managerial or executive capacity by a firm or corporation, or other legal entity, or by an affiliate or subsidiary of such a firm or corporation or other legal entity; or

(B) If the alien is already in the United States working for the same employer or a subsidiary or affiliate of the firm or corporation, or other legal entity by which the alien was employed overseas, in the three years preceding entry as a nonimmigrant, the alien was employed by the entity abroad for at least one year in a managerial or executive capacity;

(C) The prospective employer in the United States is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity by which the alien was employed overseas; and

(D) The prospective United States employer has been doing business for at least one year.

The first issue in this proceeding is whether the petitioner has established that a qualifying relationship exists between the petitioner and the claimed affiliated company.

8 C.F.R. 204.5(j)(2) states in pertinent part:

Affiliate means:

(A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;

(B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.

Multinational means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.

Subsidiary means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal

control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner indicated in a letter of support filed with the petition that it had been incorporated in March of 1998 and was involved in the business of operating an auto repair business under a national franchise name. The petitioner stated that it had entered into a joint venture agreement with the beneficiary's overseas employer with the goal of setting up an international franchise for auto repair in China.

The joint venture agreement dated September 30, 2000 and effective October 1, 2000 provided that the beneficiary's overseas employer would assist the petitioner in opening auto repair franchise chain stores in China and in exchange the petitioner would sell fifty percent of its shares in the previously designated franchise operation to the overseas entity. In minutes of a meeting of the petitioner's board of directors on the same date, the petitioner resolved that 50,000 shares, representing fifty percent of the petitioner's outstanding shares would be transferred by Yuk Fung Lee to the beneficiary's overseas employer. The petitioner also provided stock certificate number one issued to Wai Ping Wan in the amount of 50,000 shares and dated March 26, 1998. The petitioner further provided stock certificate number four issued to the beneficiary's overseas employer in the amount of 50,000 shares and dated September 30, 2000. The petitioner also provided its Internal Revenue Service Form 1120, U.S. Corporation Income Tax Return for the year 1999. The IRS Form 1120 revealed at Schedule K, line 5 that Wai Ping Wan owned fifty percent of the petitioner. The petitioner did not provide information explaining the ownership of the petitioner's remaining fifty percent.

In response to the director's request for additional evidence including proof of purchase of the petitioner's stock by the overseas entity, counsel for the petitioner stated that the overseas entity had paid \$30,000 as an initial payment to acquire fifty percent of the petitioner. Counsel further explained that the \$30,000 was paid into the beneficiary's bank account by the overseas entity and later wire transferred to the petitioner's counsel. Counsel indicates that this method of transmission was approved by the overseas entity in a special director's meeting. Counsel also states that it paid "\$30,000 to Sam Wan, the President and major shareholder of the U.S. company." Counsel also provides copies of the cancelled checks involved in this transaction.

The director in her determination focussed on the petitioner's IRS Form 1120 for 1999 and its business license and concluded that this evidence reflected that the petitioner was still operating as a franchise. The director noted that the Service does not recognize franchise businesses as qualifying organizations because control of the business could not be established due to licensing

requirements of the franchise agreements.

On appeal, counsel for the petitioner asserts that the Service failed to consider the evidence demonstrating that the petitioner terminated the national franchise and transferred fifty percent of its ownership to the beneficiary's overseas employer. Counsel also referenced the petitioner's IRS Form 1120 for the year 2000 indicating that it had been provided and not considered by the Service.

Counsel's assertion is not persuasive. The record does not contain the petitioner's IRS Form 1120 for 2000 and it is not listed on the index of documents submitted by the petitioner. The record does not contain a copy of the petitioner's national franchise agreement detailing the right and ability of the petitioner to unilaterally terminate the national franchise agreement. Moreover, the record does not establish that the overseas entity purchased fifty percent of the petitioner's shares. The transfer of monies from the beneficiary's account to counsel accompanied only with an unverified statement by the overseas entity that this method of transfer was acceptable is not sufficient to establish the purchase of shares by the overseas entity. In addition, counsel paid the purchase price of the shares to the current "President and major shareholder." It is not clear why this individual would receive a sum of money for shares held in someone else's name. Further, the petitioner has not provided a stock ledger or share certificates that show the owners of stock certificates two and three. Finally, the owner of 50,000 shares of the petitioner, Wai Ping Wan, is identified as the majority shareholder. This evidence raises questions regarding the true owners of the petitioner. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. Matter of Ho, 19 I&N Dec. 582 (BIA 1988).

The petitioner has not established a qualifying relationship with the beneficiary's overseas employer.

The second issue in this proceeding is whether the beneficiary will be performing managerial or executive duties for the United States enterprise.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially provided a broad position description for the beneficiary that primarily paraphrased elements of the executive and managerial definitions without conveying an understanding of the beneficiary's actual day-to-day duties.

The director requested further information on the beneficiary's proposed duties for the United States enterprise and received the following response from the petitioner's counsel:

[T]he beneficiary has not yet performed the executive

duties she would be expected to perform as the Executive Director. The reasons being, on the one hand, the beneficiary is in the stage of gaining the practical experience of the auto repair business through her knowledge and experience in business would not have adversary [sic] effects on her ability to act in an executive capacity. On the other hand, the beneficiary is awaiting the approval of her L-1 status.

Counsel continued by stating that the beneficiary had attended management meetings and would formally start her executive duties once the business plans for setting up the international franchise were implemented. Counsel then described the beneficiary's duties in the United States by re-stating elements of the managerial and executive definitions and adding that the beneficiary would plan and analyze the data necessary to set up an auto repair franchise in China. Counsel continued by stating that the purpose for the transfer of the beneficiary to the United States was to make preparations and plans for implementing an international auto repair franchise in China. The petitioner also provided its organizational chart depicting a president, the beneficiary as executive director, a vice-president, a manager and several mechanics, technicians, and a bookkeeper.

The director determined based on the petitioner's job description for the beneficiary that the beneficiary would not be performing executive or managerial duties for the petitioner. The director then speculated that the petitioner did not need an executive because it was a small auto repair business and such businesses did not need executives. The director concluded that the beneficiary would be a first-line supervisor of non-professional employees.

On appeal, counsel asserts that the statute was not meant to limit managers or executives to persons who supervise a large number of persons or a large enterprise. Counsel asserts that the beneficiary is a functional manager.

Counsel's assertion that the statute is not meant to limit this classification solely to managers or executives of large enterprises or supervisors of a large number of persons is correct. Moreover, the director's speculation as to the requirements of the petitioner's auto repair business for an executive has no basis in the record, case law or the statute.

However, the director's determination that the beneficiary would not be performing executive or managerial duties for the petitioner based on the petitioner's job description is correct. In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). The petitioner has not provided a comprehensive description of the beneficiary's job duties. As noted above, the petitioner and

counsel rely on paraphrasing elements of the managerial and executive definitions without conveying a sense of what the beneficiary will be doing on a daily basis. Counsel's attempt to explain that the beneficiary would be learning the auto repair business and using that information to set up an auto repair franchise in China does not translate into an executive or managerial function. The beneficiary will not be directing or managing the petitioner but apparently will be learning the business. Counsel's assertion on appeal that the beneficiary is a functional manager is not fully delineated. Counsel fails to describe the function the beneficiary purportedly will manage. If the Service liberally construes the requirements of evidence for this classification and speculates that the function is to set up international auto repair franchises, it is clear from the record that the beneficiary would be the individual performing the function, not managing it. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988). The record does not establish that the beneficiary will primarily be engaged in executive or managerial duties.

The third issue in this proceeding is whether the petitioner has established that the beneficiary was performing managerial or executive duties in her position with the overseas entity. On this issue, the description of the beneficiary's duties for the foreign entity and the foreign entity's organizational chart indicate that she was more than a first-line supervisor. She supervised several individuals who appeared to be supervisors of other individuals who carried out the duties of finance, administration, and business operations of the foreign entity. The record is sufficient to establish that the beneficiary was employed by the foreign entity in a managerial position.

Beyond the decision of the director, the petitioner has not established its ability to pay the beneficiary the proffered wage of \$25,000 per year.

8 C.F.R. 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner has only provided its IRS Form 1120 for the year

1999. The Form 1120 reveals net income of negative \$41,096. The petitioner has also stated that the foreign entity has agreed to continue to pay the beneficiary's salary. However, for this visa classification it is the petitioner that must be established and be in a position to assume responsibility for the beneficiary's salary. As the appeal is dismissed for the reasons stated above, this issue is not examined further.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.